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Supreme Court of the United States

OCTOBER TERM 1961

No. 135

ESSO STANDARD OIL COMPANY, a corporation,
Petitioner,

against

EDNA FALL, as Administratrix of the Estate of PHILLIP FALL, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WALTER X. CONNOR,
120 Broadway,
New York, N. Y.

LOUIS KURZ, JR.,
704 Florida Theatre Building,
Jacksonville, Fla.

Attorneys for Petitioner.

CARROLL JOHN RYAN,
Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 990

ESSO STANDARD OIL COMPANY, a corporation,
Petitioner,

against

EDNA FALL, as Administratrix of the Estate of PHILLIP FALL, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered on December 13, 1961 which reversed a judgment in favor of petitioner. Petitioner's judgment was based on a jury verdict in its favor. Petitioner filed a petition for rehearing which the Court of Appeals denied on February 22, 1962.

The reversal by the Court of Appeals was based on a re-examination of the facts found by the jury and by virtue of a United States Statute which was not in effect at the time of the acts complained of by the respondent. Both of these holdings were contrary to the Constitution of the United States. There were other errors hereafter set forth.

OPINION BELOW.

The opinion for the Court of Appeals for the Fifth Circuit is attached to this petition, pages A-3—A-14. It is reported at 297 F. 2d 411.

The decision of the Court of Appeals denying petitioner's petition for a rehearing has not yet been reported. However, it did no more than deny the petitioner's petition without opinion.

There was no opinion by the trial judge.

Jurisdiction.

As heretofore stated, the judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 13, 1961, and the petition for rehearing was denied on February 22, 1962. The jurisdiction of this Court is invoked under Section 1254(1) Title 28 USC.

Statutes Involved.

Article 1, Clause 9 of the United States Constitution.
Fifth Amendment to the United States Constitution.
Seventh Amendement to the United States Constitution.
46 U.S.C. 688; 710.
18 U.S.C. 2277.
15 U.S.C. 1241-1244.

The foregoing Constitutional Amendments and statutes are fully set forth in the appendix—pages A-15 to A-19.

Questions Presented.

1. May a court of appeals re-examine the facts on which a jury rendered a verdict in favor of the defendant, petitioner here, and reverse the judgment in favor of the defendant and order a new trial because the Court of Appeals differs from the fact findings made by the jury? Does not the Seventh Amendment to the Constitution bar such re-examination and retrial?

2. May a court of appeals hold petitioner negligent for legal acts done by its servants on the basis that similar acts were proscribed by a statute enacted long *after* the petitioner's servants acted?

3. May a court of appeals reverse a judgment in favor of petitioner for an alleged error which is not in the record? Respondent never urged the alleged error and because of this she was barred from raising it on appeal. (Rule 51, Federal Rules of Civil Procedure).

4. May a court of appeals reverse a judgment in favor of petitioner on the basis of an alleged error in the charge to which the respondent took no exception? (Rule 51, Federal Rules of Civil Procedure).

5. May a court of appeals order a new trial in an action for damages for wrongful death of a seaman (46 U. S. C. 688) on the basis of "unseaworthiness" in the face of the rulings of this Court that no such cause of action exists?

6. Does the mere possession by a crew member of a pen knife whose blade opens on pressing a button make a shipowner absolutely liable under Title 18 U. S. Code 2277 where the statute does not forbid the possession of such knife, and where, even if the statute did forbid it, there was no showing that the seaman possessed it without the consent of the master or the owner of the vessel.

7. Should not *certiorari* be granted where two circuits have reached opposite conclusions with respect to the quality of the person possessing a knife on shipboard? In

the case at bar mere possession was held an act of negligence on the part of the shipowner, despite the jury's verdict to the contrary, whereas in *Connolly* v. *Farrell Lines, Inc.*, 268 F. 2d 653 (CA 1-1959) mere possession of a knife did not make the seaman "unseaworthy" and the vessel owner liable for assault.

8. May a court of appeals reverse a judgment in favor of petitioner after a verdict of the jury on the ground that there was an erroneous charge in respect of contributory negligence when no exception was taken thereto by respondent's counsel? (Rule 51, Federal Rules of Civil Procedure).

9. Is not an experienced seaman, who has petty officer's status, guilty of negligence where he abuses, manhandles and uses obscene language to an 18 year old messman thereby provoking an assault on himself?

The Facts.

It must be stated at the outset that the facts set forth in the opinion of the Court of Appeals do not coincide with the facts which transpired on the trial. A critical examination of the facts, as stated in this opinion, is set forth under IB.

Respondent's intestate, Philip Fall (hereafter called Fall) died as a result of an altercation with Jimmy Murphy. Both were crew members of SS. *Esso Augusta,* Fall being the electrician and Murphy, a crew messman. The vessel was docked in Baton Rouge, Louisiana, at the Esso Standard refinery at the time of the events in suit.

The altercation was the culmination of abusive treatment by Fall of Murphy beginning some time before the date of the clash between them. 11a, 16a, 41a, 45a, 85a.*

Originally the complaint contained a count based on alleged "unseaworthiness" but this count was stricken as insufficient in law on the threshold of the litigation.

On the trial however, the trial judge allowed the respondent the opportunity to produce medical evidence of pain and suffering so as to seek recovery for such damages under the "unseaworthiness" doctrine. After taking an ample adjournment, respondent's counsel informed the court that he was unable to produce any proof of pain and suffering so this cause of action failed for lack of proof. (442, 502).

Fall was 46 years of age and had about 14 years of sea service. [211]. Murphy, his alleged assailant, was 18 years of age and had only about 8 months of service. 2a.

Murphy came from a religious background and received part of his formal education in church academies. 2a, 18a. His reputation was that of a polite, quiet, unassuming boy. 32a, 33a. On the contrary, Fall was prone to pick on his inferiors. 85a.

When his ship was in Mobile, Alabama, Murphy purchased a pocket knife (pltf's Ex. 2) in a store where he noticed it in the window. 17a. He bought it because he had always wanted one and because he thought it was "pretty". 17a. The blade of the knife operated by pressing a button and is popularly known as a switch blade. This type knife has earned an undeserved reputation in areas where there is a large amount of juvenile delinquency.

* Unbracketed references are to defendant's appendix in the Court of Appeals. Bracketed references are to the stenographer's Transcript of the Proceedings.

However, it was nothing but a pocket knife, and very useful to Murphy as a tool. 17a, 18a. Murphy made no attempt to conceal the knife, keeping it on a makeshift table alongside his bunk. 8a.

The events in suit occurred on April 24 and April 25, 1957. Prior to this time Fall had been mistreating Murphy —"treating me like a dog". 85a. There is no evidence that this situation was known to any of the ship's officers but Fall did have a reputation for being a "know-it-all". 16a.

The SS. *Esso Augusta* was loading cargo at the Esso refinery docks, some 1½ miles from the gate of the refinery enclosure. Crews of vessels docked within the enclosure, traveled by a company jitney or bus from a "turn-around" point near the dock to the gate. There they were screened by security guards, both to and from "town". Murphy went ashore on April 24, 1957, about 7 P. M., after the day's work was done, 9a, and visited various bars. 10a. At one of these bars he engaged in conversation with one of the owners, a woman referred to as "Mary". 11a. There were other women in the bar whom Murphy described as "bar flies". 19a.

While Murphy was in conversation with Mary, Fall entered the bar and seeing Murphy, accosted him. Fall took hold of Murphy and jerked him around demanding "what the hell are you doing talking to my girl". 11a. A scuffle ensued which was broken up by Mary. 19a.

Later on Murphy returned to the refinery gate. Fall also was present but they had not traveled together. They entered the jitney provided by the company. Murphy sat on the front seat with the driver and Fall sat in the rear. 41a. As the jitney proceeded to the ship, it made a sharp turn causing Murphy to slide off the seat. 41a, 42a. Whereupon, Fall said to Murphy "don't fool around with the

driver". 45a. Instead of "fool" a much more seaman-like term was used. 45a. A wordy argument ensued and lasted until the jitney reached the turn-around point where the men left it. 41a. No blows or threats were exchanged but the men continued to argue. 42a.

The jitney driver and two of the security guards intervened and quieted the men. 42a. The guards exercised control over seamen returning to their ships and would not permit a drunken or disorderly seaman to return to his ship. A drunken seaman was kept at the gate until he sobered up. 59a. A disorderly seaman was turned over to the sheriff for incarceration. 58a.

Neither Murphy nor Fall exhibited any signs which made it necessary for the guards to bar them from their ship or to report them to the ship's officers: 59a. Both were escorted to the ship without difficulty. 44a. The guards said that the men probably had been drinking but neither was drunk. 44a. They did not stagger and went quietly to the ship. 44a, 60a. Indeed, Murphy said he was "going to bed". 44a.

The guards were experienced men who had dealt with seamen and their arguments on many prior occasions. 45a. One of them had been a police officer. 39a. They judged that the wordy argument between Fall and Murphy was over and that no trouble was to be anticipated. 44a, 46a, 59a. Seamen's arguments are common occurrences when seamen return from ashore. 43a, 37a, 60a. The one between Fall and Murphy was not any different from the others. 60a.

When Murphy boarded the ship he went to his room, passing through the messroom in order to do so. 26a. Third Engineer Schuler was seated in the messroom having a cup of coffee. Soon thereafter, at about 2:30 A. M.,

Murphy returned through the messroom at a fast pace. 27a. Schuler was still seated in the messroom. Murphy was in the messroom on this second occasion about 2 seconds but Schuler noticed, as Murphy was almost through the room, that he held a closed knife in his hand. 33a. Murphy muttered something about getting the electrician. 27a. Schuler asked Murphy what he was doing with the knife but evidently Murphy did not hear him. 27a.

Because of Murphy's good reputation and the fact that he was an unusually quiet boy, Schuler did not at once conclude that Murphy meant any harm to anyone. 32a, 33a, 34a, 37a. However, he immediately got up and followed Murphy arriving at Fall's room less than 30 seconds after Murphy had left the messroom. 27a, 28a, 33a. At Fall's room he found Murphy and Fall grappling. 28a. Murphy held a knife in his hand. 28a. At the first opportunity, Schuler stepped in and seized Murphy's arm, whereupon Fall ran out of the room. 29a. Schuler told Murphy to drop the knife which he did. It was only then that Schuler realized that Fall might have been injured. 29a.

There was no direct evidence as to how Fall was injured. There were no witnesses except Fall and Murphy. Fall lapsed into unconsciousness before he could give any explanation. Murphy testified in his deposition that he could not remember any of the details. 12a.

However, in a statement which he gave to one Sliman, chief investigator for the district attorney of Baton Rouge, Murphy gave the following details: 85a

> "When I got my knife I immediately went to the electrician's room.
>
> I was going to his room to scare him and I brought my knife in case he started anything. I wanted to talk it over.

Just as I got to his door he opened the door and he went for me. As far as I know I had the knife in my hand when he came at me, but it was closed.

He grabbed me and we tussled. I remember falling on the couch. I guess it was then I opened the knife. I remember stabbing at him but I didn't know whether I hit him or not. I didn't mean to stab him. I went to his room to talk things over, and everything happened so fast it's not too clear in my mind."

This statement was received in evidence (Deft. Ex. D) not for proof of the facts but to show that at one time Murphy did have a recollection of what had transpired. [299].

After Fall left his room following the scuffle he went along the deck and up the gangway to the dock where he collapsed. Immediate treatment was rendered and an ambulance from the refinery took him to the gate where he was transferred to another ambulance. However, he died on the way to the hospital.

All seamen carry knives. 62a, 64a. They are necessary tools for the deck seamen and valuable to other crew members in the event of a collision or other catastrophe where a seaman might become entangled in the ship's lines. 62a, 64a.

In any event, the knife is not a sheath knife which is prohibited by statute, but a pocket knife. As was pointed out on the trial, almost any heavy object can be a lethal weapon if used for that purpose. There are any number of such objects on board a vessel, such as marlin spikes, wrenches, hammers, etc., which, if used as weapons, can cause serious injury and death. The same is true of the assortment of knives which is customarily kept in the galley.

63a. These are even more dangerous than pocket knives. 63a, 64a.

On the whole, the facts presented below clearly justify the jury's finding that the petitioner was not guilty of any negligence and that Fall's injuries were provoked by him through his persistent mistreatment and abuse of Murphy. Assuming that Murphy did stab Fall, it was not foreseeable on the part of petitioner's agents and their acts were in no respect responsible for the result as the jury found.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER HAD A CONSTITUTIONAL RIGHT TO THE PROTECTION OF ITS JURY VERDICT. REVERSAL OF THE JUDGMENT IN FAVOR OF PETITIONER BASED ON A RE-EXAMINATION OF THE FACTS FOUND BY THE JURY BY THE COURT BELOW VIOLATED PETITIONER'S RIGHTS. PETITIONER'S JUDGMENT SHOULD BE RE-INSTATED.

A.

It can be seen from the analysis of the facts (B, hereof) re-examined by the court below that there was an unconstitutional usurpation of the function of the jury. The court of appeals had no such right. Certainly it had no right to find facts differently than were implicit in the findings of the jury. Petitioner was entitled to all of the favorable inferences which arose from the verdict in its favor. The court ignored this principle which is well recognized.

This Court recently had occasion to reiterate the limitation of a court of appeals in respect of findings by a jury. In *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd., et al.*, 369 U. S. 355. This Court said with respect to the fact finding by a court of appeals page 358:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'"

and again at page 364:

> "So far as we know the jury may have found respondents liable not on either of those two grounds but solely on a third, namely because of defective bands—a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so. *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563, 567. If that was the jury's view of the facts, then petitioner plainly would not be liable under its warranty. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360. Cf. *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 446."

In *Kirstner* v. *Atlantic Greyhound Corp.*, 190 F. 2d 422 the court said at page 423:

> "The appeal presents no ground upon which plaintiff can ask relief. It was argued with much

> force that the jury reached a wrong conclusion in its verdict; but this involves a pure question of fact which is not reviewable by us on appeal. The Seventh Amendment to the Constitution expressly provides that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. The motion to set aside the verdict and grant a new trial was a matter resting in the sound discretion of the trial judge; and it is well settled that action thereon cannot be made the basis of relief on appeal in the absence of abuse of discretion, which is not present here."

The cases holding the same principle are legion. One more pertinent citation is found in *Liberty Mutual Insurance Company* v. *Thompson*, 171 F. 2d 723, where the court said at page 726:

> "Finally, the jury is the sole judge of the credibility of the witnesses and of the weight or value of their testimony. In actions at law in the federal courts where the evidence is such that reasonable men may fairly differ as to whether an employee is disabled from an accidental injury or an occupational disease, the right of trial by jury is preserved by the Seventh Amendment, 'and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. This means that an appellate federal court should not disturb the jury's findings of fact as to the accidental cause of appellee's disease, if on the trial there was any substantial evidence to support it. This is so, even though the appellate judges may not believe the fact so found to be true, since an appellate court has no constitutional right to express

an opinion as to the truth or falsity of such fact, the issue being entirely within the province of the jury. The judgment appealed from is affirmed."

The unjustified conclusions with respect to the facts which the court below made on the re-examination of the facts shows the soundness of the proscription contained in the Seventh Amendment. As is noted more and more frequently these days, there is a tendency on the part of courts to give weight to circumstances which will resolve a litigation favorably to seamen. This is not a practice which can be justified.

The judgment in favor of petitioner should be re-instated.

B.

FACTS STATED ERRONEOUSLY IN THE OPINION OF THE COURT OF APPEALS.

Petitioner respectfully points out, seriatim, the erroneous statements of fact by the court in its opinion filed herein. These statements are in italics.

Page A-4. *Murphy's immediate superior was "not sure" whether Murphy's knife was a switchblade knife.*

The testimony does not support this. On page 64a, the testimony of Montero, Murphy's superior, is set forth. Montero there testified that he could not tell what type of knife it was and did not know whether it was a plain knife or a pushbutton knife.

Page A-4. *The court implies that the description of Murphy as polite, quiet and unassuming is not borne out by the record because of what took place on one occasion, viz, the night of the stabbing.*

The testimony with respect to Murphy's quiet character was established, without contradiction, by all of the witnesses who testified about it. Murphy's good reputation was important from the point of view of the notice which petitioner's employees had with respect to Murphy's activities. It is unjust to imply that Murphy's character was other than polite, quiet and unassuming, except on this one particular occasion when he was goaded into anger by Fall.

Page A-4. *Murphy went ashore without eating.*

Undoubtedly, the intended implication is that he drank on an empty stomach. The record is otherwise, 9a.

Murphy testified that he left the vessel around 7:00 o'clock in the evening "after supper".

Page A-4. "* * * *when the Esso bus reached the refinery* * * *"*

The bus in which the men were riding when Murphy fell off the seat, and when Fall abused him about it, was the refinery bus which traveled wholly within the refinery. There was no dispute about that.

Page A-4. *Murphy and Fall scuffled after leaving the bus.*

There was no scuffling or no wrestling, which "scuffling" implies. The men approached each other but did not strike or take hold of each other, 42a, 58a, 60a, 61a, 63a.

Page A-5. *Defendant's witnesses had lower standards for judging drunkenness than police standards.*

There was no support in the record for this statement. Indeed, the record shows that one of the guards who made the determination was a former police officer, 39a.

Page A-5. *"Schuler followed, but not soon enough."*

What this sentence intended to imply is not clear. If it is to express the idea that Schuler delayed in following

Murphy, it is not supported by the evidence. The fact is that Schuler got up immediately to follow Murphy. True, he arrived late, but he arrived less than 30 seconds after Murphy had left the messroom where Schuler had been sitting, 33a.

Page A-5. *"Defendant argues that Fall persistently mistreated Murphy."*

Petitioner did not make this contention, 27a, 28a, 33a. It contended that Fall was prone to pick on his inferiors, 85a, treated Murphy like a dog, 85a, and had a reputation for being a "know it all", 16a. Fall had in fact physically attacked Murphy ashore in Mary's Bar, 11a, and later, when riding back to the ship by bus, Fall started an argument with Murphy, 45a.

Page A-5. *"The court also struck the allegations in the complaint which contended that the decedent's claim for pain and suffering caused by unseaworthiness survived in the estate."*

Originally, Judge Simpson did strike this claim but on the trial restored it, (442). Judge Simpson allowed respondent the opportunity to produce medical evidence of pain and suffering. After giving respondent's counsel ample adjournment, Judge Simpson was advised by him that respondent was unable to produce any proof of pain and suffering. Mr. Rassner, representing the respondent, stated, "The doctor said that in a case such as this—I explained to him what had happened—the only people that could give an opinion would be the people who actually saw the man. He said he couldn't give expert testimony. He said, "There is no medical way that I can do it' ", (502).

Respondent's counsel did not press the matter any further and it was not submitted to the jury inasmuch as there

was no proof of pain and suffering. Furthermore, respondent did not ask that it be submitted to the jury nor make any proffer of what he had hoped to prove under the proposed amendment to the complaint.

Page A-6. *Murphy's knife was unsuitable as a screwdriver.*

Nonetheless, Murphy used it as a screwdriver and so testified, 17a. It is not contended that a knife such as Murphy possessed would not be "highly suitable for stabbing an opponent in a fight". Nor would a hammer be unsuitable if it was used as a club to crack open a skull. This merely brings back to mind what the petitioner contended all along: That this ship, and any ship for that matter, carries by necessity a number of devices and instruments capable of delivering a lethal blow, if used for that purpose, ranging from coffee cups to wrenches, fire axes and burners.

Page A-6. *"Half of the case collapsed when the trial judge dismissed the complaint as to unseaworthiness".*

It is true Judge Simpson dismissed the complaint as to unseaworthiness, but not on the trial. The dismissal took place on the threshold of the litigation, prior to the time petitioner filed its answer, and before any discovery was undertaken by respondent.

Page A-6, *"The other half fell apart during the trial when the district judge made it clear that, as a matter of law, he regarded the knife as a useful tool and not a dangerous weapon per se."*

Judge Simpson made no such finding and said that he would permit the jury to determine whether it was a dangerous weapon. This statement was made during the charge conference when he was correcting one of the requested charges submitted by the respondent.

Page A-7. *The court refused to give any charge referring to the knife as a dangerous weapon and gave no instructions as to dangerous weapons.*

Judge Simpson did not refuse to give any charge referring to the knife as a dangerous weapon. The failure of Judge Simpson to charge as to dangerous weapons was not called to his attention as required by Rule 51 F. R. C. P. and if there were any error in this respect, respondent waived it and cannot now be heard to complain, (469).

Page A-7. *The court withdrew the dangerous weapon issue from the jury.*

That issue was not withdrawn, 50a. Judge Simpson said that he was leaving it for the jury to determine, (469). He did not allow the jury to determine the meaning of "dangerous weapon" under the statute; that being a determination of the law which is reserved to the court and not the jury. After the quotation of the charge ending on page 7 of the opinion, Judge Simpson charged the jury as follows:

> "The defendant, Esso Standard Oil Company, is responsible for the acts of its servants in the circumstances and if there was there—if there were danger flags flying that they should have seen and anticipated that this electrician, Mr. Fall, was in danger and if they failed under those circumstances to take steps that a reasonably prudent person would have taken, then you should find that the Esso Standard Oil Company was negligent. It is clear, it seems to me from the evidence, that nobody did anticipate it, but the question is should they have? Were they in the knowledge of circumstances that a reasonably prudent person would have taken to mean that there was danger to the electrician, Mr. Fall, and taken steps to prevent it? That is

> the real issue of negligence which is submitted here and which you gentlemen must consider in this case: Was this assault reasonably to have been anticipated from the attendant circumstances? And you should weigh all the circumstances; go back to everything that had occurred that was known, or reasonably should have been known to the servants and agents of the defendant. Was it negligent for further steps not to have been taken by the men at the gate to admit them, or by the jitney driver, or by the man there at the security office down on the dock side, as I recall the testimony, or by some personnel aboard, including, specifically, Mr. Shuler? If a reasonably prudent person under all the circumstances would have taken further steps and such further steps would have been effective to have prevented the injury and death of Mr. Fall, then you should make a finding of negligence." 72a.

Again, if respondent felt aggrieved by the failure of Judge Simpson to give an instruction with respect to the "dangerous weapon issue", she should have called it to his attention, as the rule requires.

Page A-8. *A seaman may not bring an axe aboard a ship.*

No authority is cited for this. It is a matter of common knowledge that most alleyways on ships are equipped with fire axes.

Page A-8. *A messman cannot lawfully bring a switchblade knife aboard a ship nor "making bad matters worse, keep it on a table near his bunk, presumably for instant use."*

At the time of this occurrence, there was no statute specifically prohibiting the possession of a switchblade knife aboard a vessel. The implication in the court's language that Murphy kept a switchblade knife alongside of his bunk

for instant use as a weapon has no support in the evidence. On the contrary, his keeping it alongside his bunk, in the open, is a clear indication that he never had any intention of using it as a weapon, otherwise he would have kept it hidden so his intended victims would be unaware that he possessed it. Morever, his character and deportment on board the vessel, 2a, 18a, 32a, 33a, does not support the court's unjust implication that he was ready, willing and able to commit violence with a switchblade knife.

Page A-13. *"At the trial the plaintiff's counsel saw the chief mate in the courtroom and called him as a witness."*

There is nothing in the record which supports this statement. It is true respondent's counsel called the chief mate as respondent's witness. Why he did so is a matter for conjecture. He had no need to call the chief mate as respondent's witness because he already had the mate's testimony, as an adverse party, which he could have read to the jury. The probability is that it was trial strategy that backfired.

Page A-13. *"The plaintiff should not be bound by the chief mate's testimony and the mate should be subject to cross examination."*

This is a legal matter which is argued in the brief. Sufficient to say now, respondent is bound by the testimony of an adverse witness if she offers his testimony in court.

Page A-13. *Nelson's deposition testimony showed the practice in the merchant marine to consider the switchblade knife as a dangerous weapon.*

Nelson did not so testify. What he said was that all seamen have knives but in the case of a messboy he would report possession of a switchblade knife to the Master, (171) 49a.

Page A-14. *"Fall could not have foreseen the vicious attack Murphy made upon him with a dangerous weapon."*

There is no testimony whatsoever in the record as to any attack made upon Fall by Murphy (much less a vicious one); to the contrary, according to Murphy's own statement, Fall was the aggressor and first attacked Murphy ashore, in the bus and on the ship. (Murphy's statement, def. ex. D; 83a-85a). Murphy said, "Just as I got to his door he opened the door and he went for me. As far as I know I had the knife in my hand when he came at me, but it was closed."

In stating that there was a "vicious attack" with a "dangerous weapon" the Court below ignored the evidence and relied on its faculties of imagination. Moreover, the Court thus belied its own statement (page 12A) that these matters were for the jury's determination.

It is a fundamental law that a judge, be he trial judge or appellate judge, may not substitute his determination of the facts for that of the jury, United States Constitution Amendment VII.

Implicit in the jury's verdict of "not guilty" were findings that the petitioner was not negligent in failing to prevent Murphy and Fall from boarding the vessel, nor was Schuler negligent; and in general, it was not negligent in failing to prevent the death.

Under the law, all of the issues must be resolved in the light most favorable to the party who receives the verdict. The opinion of the court below ignores this principle and proceeds to make findings which are inconsistent with those of the jury and even inconsistent with the actual testimony.

See, e.g., *Southern Farm Bureau Casualty Ins. Co.* v. *Palmer,* 263 F. 2d 206, (CA 5, 1959); *Reid* v. *Nelson,* 154 F. 2d 724, (CA 5, 1946); *Home Ins. Co. of New York* v. *Tydal Co.,* 152 F. 2d 309 (CA 5, 1946).

II.

THE CONCLUSIONS OF THE COURT BELOW WITH RESPECT TO PETITIONER'S NEGLIGENCE BASED ON A STATUTE NOT IN EXISTENCE WAS ERROR.

The court in its opinion, A-8, in language characteristic of an advocate rather than a court says: "Two federal statutes, read together, are dispositive of this case. One of these, the Switchblade Act; was not called to the attention of the district judge, an omission that may account for the tenor of the charges; in a colloquy with the attorneys, the district judge commented on the statutory prohibition of sheath knives and the absence of a statute defining a switchblade as a dangerous weapon".

Later, page A-9, the court notes that the Switch Blade Act was passed subsequently to the event in the case at bar but then says: • • • "In these circumstances it only makes sense to resort to a later statute, even one not directly related to the statute to be construed."

> Again, page A-12, the Court says • • • "We say, as the Act indicates, that a fair and reasonable interpretation of the term 'dangerous weapon' permits a jury to find that Murphy's knife came within the statutory meaning."

What the court is saying, in the first instance, is that on its re-examination of the facts found by the jury it differs from the facts found by the jury which the Constitution says the court may not do. In the second place it says that the quality of the acts of petitioner's servants should be judged by a penal statute enacted *after* the event. This, of course is holding petitioner guilty *ex post facto*.

The Switch Blade Act is a penal statute. Its effect may not be enforced with respect to events which took place before its enactment.

Calder v. *Bull*, 3 Dallas 386.

Certainly it cannot be used as a basis for the interpretation of another statute which had been the law for 90 years, previously. (The "Dangerous Weapon" Statute, 18 U. S. C. 2277 enacted 1948—the "Sheath Knife" Statute, 46 U. S. C. 710, 1903.)

With respect to the Sheath Knife Statute, one thing is very clear. The Statute does not forbid the *possession* of a sheath knife. It merely forbids the *wearing* of it on shipboard. A seaman, therefore, would not be violating the statute, if he kept one on a makeshift table alongside of his bunk in a place similar to where Murphy kept his pen knife.

Apparently Congress does not consider a sheath knife as a dangerous weapon since in the Congressional hearing which preceded the adoption of the Switch Blade Act, Congress referred to the "conventional sheath" knife as being recognized and generally employed by hunters, fishermen, sportsmen and others. Cf. Opinion of the court below pp. A-11 and A-12. On the trial of the instant case, not only did counsel admit to having switch blade knives but the court itself said it had one and found it very useful.

With respect to the Dangerous Weapon Statute, it is significant that dangerous weapons of all kinds may be taken aboard a vessel provided it is done so with the consent of the "owner or master of said vessel".

A common rule of interpretation applies to all of these Acts. The rule is that a criminal statute is not to be read

expansively to include what is not plainly embraced within the language of the statute since its purpose, fairly to apprise men of the boundaries of prohibited action, would then be defeated. *Cordell* v. *U. S.*, 335 U. S. 345 Reh. Den. 335 U. S. 900, and 336 U. S. 97; *Schmokey* v. *U. S.*, 182 F. 2d 937; *U. S.* v. *Resnick*, 299 U. S. 207, 209; *Smith* v. *United States*, 360 U. S. 1.

It should be noted also that under Article 1 of the Constitution empowering the legislature, it is by Clause 9, ¶. 3, forbidden to Congress to make any *ex post facto law.* Moreover the Fifth Amendment to the Constitution provides that persons shall not be deprived of property except by due process of law. To deprive the petitioner here of its property on the basis of *ex post facto* laws would certainly be depriving the petitioner of its property without due process.

III.

THE COURT BELOW WAS IN ERROR IN STATING THAT THE TRIAL COURT HAD ERRONEOUSLY WITHDRAWN FROM THE JURY THE QUESTION OF WHETHER THE PEN KNIFE WAS A DANGEROUS WEAPON. IT WAS NOT WITHDRAWN FROM THE JURY'S CONSIDERATION NOR DID RESPONDENT'S COUNSEL ASK THAT THE JURY CONSIDER WHETHER IT WAS OR WAS NOT DANGEROUS.

The sole contention of the respondent in respect to the knife was that a seaman was prohibited by the "Dangerous Weapon" Statute from possessing the knife and that, therefore, his possession of it involved the shipowner in negligence because it did not discover that the seaman had the knife and did not remove it from his possession.

The respondent's counsel did not seek a charge that the jury determine whether or not the knife was a dangerous

weapon. In the charge conference with counsel, the court said on two occasions that the question of whether a knife was a dangerous weapon, was for the jury to determine (469, 475). The respondent's counsel argued at length to the jury that the knife was dangerous and that it was forbidden by statute (81a, 82a). This argument alone establishes counsel understood that the question of whether the knife was a dangerous weapon had not been withdrawn. He had been advised by the court previously "I think you can argue that it is dangerous * * *" (523).

In any event, after the court completed its charge respondent's counsel was asked by the court "I would ask you first if there is anything additional". To which respondent's counsel replied "No sir—your Honor—no objection". Thus respondent's counsel told the court in language as clear as one could make it that there was nothing additional he wished the court to charge and that he had no objection to what the court had charged.

For the court below to say in its opinion that the trial court had withdrawn from consideration of the jury whether or not the knife was a dangerous weapon is a plain distortion of what actually took place at the trial.

Rule 51, of the Federal Rules of Civil Procedure was intended to expedite the administration of justice and to afford a trial judge adequate opportunity for correcting any errors, or omissions which may have occurred in his charge. The significance of this may be gleaned from *Curko v. W. Spencer & Son Corporation*, (1961 C. A. 2), 294 F. 2d 410.

There defendant had a verdict and plaintiff appealed on the ground that the court had refused a charge, which under the evidence, he was entitled to have. The Court of Appeals

agreed that the facts in the case justified a charge as requested but nonetheless affirmed on the ground that plaintiff's counsel had failed to point out to the court the significance of the charge and its relevance to the facts proven.

In the case at bar, there was neither a requested charge nor an objection to any omission. If respondent felt aggrieved either by a wrong charge or an omission to charge, he was required under F. R. C. P. 51 to make known his position clearly so that if correction was necessary it could have been done. Certainly, the administration of justice was not furthered in the instant case, where the trial court was reversed for an alleged error in its charge which error was not called to the court's attention and no exception was noted.

In the circumstances, the reversal of petitioner's favorable judgment was a plain invasion of its constitutional rights which this court should correct by reestablishing the judgment.

IV.

THE REMARKS OF THE COURT BELOW WITH RESPECT TO UNSEAWORTHINESS ARE CONFUSING, AND IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals in its opinion A-14 refers to a supposed right to recover damages for wrongful death under the doctrine of "unseaworthiness". The language is so confusing that should this case have to be re-tried the trial judge is bound to be at a loss to determine whether he must follow the seeming mandate of the Court of Appeals or whether he must look higher and follow the precise determination of this Court. It is submitted that a

trial judge should not be left as a rudderless ship in a storm without a compass.

In *Kernan, Administrator* v. *American Dredging Co.*, 355 U. S. 426, this Court spoke words as clear as the English language can make them that • • • "[T]he remedy for unseaworthiness derives from the general maritime law and that law recognizes no cause of action for wrongful death whether occasioned by unseaworthiness or negligence. *The Harrisburg*, 119 U. S. 199 • • •".

In the face of this language, which was quoted in petitioner's brief, the Court below has labeled this Court's determination as "anomalous and archaic."

While the conception of the court below with respect to matters in derogation of the common law may be sincere nonetheless, it is not legal and should be disregarded.

As already stated by this Court in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, the entire doctrine of unseaworthiness is of doubtful legitimacy. The doctrine ought not to be further extended.

V.

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE DIVERGENCE OF COURTS OF APPEALS ON A MATTER OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A well established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by another circuit court whose judgment is final in the absence of Supreme Court review.

In *Connolly* v. *Farrell Lines, Inc.*, 268 F. 2d 653 (1959), the Court of Appeals for the First Circuit held that a seaman who committed an assault was not unseaworthy because

he had concealed one of the ship's knives under his pillow. Likewise the Court held that the shipowner was not negligent in continuing to employ the seaman after he had been found to have concealed a ship's knife under his pillow. There was no evidence that he was known to be a source of peril nor was there any evidence that he had previously shown any belligerent nature or had shown a proclivity for assaulting people.

In the case at bar, the facts which might be charged against the shipowner were far less grave than those in the *Connolly* case. The court below held that a seaman who kept a pen knife, albeit a switch blade, exposed to view was "unseaworthy" and the shipowner negligent because it did not discover the knife and confiscate it. Murphy, the seaman involved, had a reputation for being a quiet, unassuming and unusually polite boy, having had a religious education. 32a, 332, 2a, 18a. There was no evidence to show that he was a source of peril or had shown any tendency of a belligerent nature or a proclivity for assaulting people.

Obviously the decision of the First Circuit is correct. The decision to the contrary puts an unjust burden on a shipowner and implicitly requires a shipowner to perform an obligation which the statute (18 U. S. 2277) does not.

VI.

THERE WAS NO ERROR IN THE CHARGE IN RESPECT OF FALL'S NEGLIGENCE. MOREOVER NO EXCEPTION WAS TAKEN TO THE CHARGE.

As indicated in III, under Rule 51 of the Federal Rules of Civil Procedure, it is necessary that exception be taken to an erroneous charge before the reversible error can be charged, and reversal obtained on the basis of the error.

It must first be said that there was utterly no evidence before the jury as to how Fall suffered his fatal wound. This was left entirely to the conjecture of the jury which could very well have found that the wound was suffered when Fall attacked Murphy, as Murphy first said in his statement to the district attorney of Baton Rouge (83a). Even it were otherwise, it would not exculpate Fall in respect of negligence.

This court has held that an assault is negligence, *Jamison* v. *Encarnacion*, 281 U. S. 635. It follows that if an assault is negligence, provocation to an assault is also negligence. The fact that a period of time intervened between Fall's undenied provocation to assault and the alleged assault itself is of no moment. *Boudoin* v. *Lykes Bros. SS Co.*, 348 U. S. 336, page 339 quoting *Jones* v. *Lykes Bros. Steamship Co.*

> "'All men are to some degree irascible; every workman is apt to be angry when a fellow complains of his work to their common superior; and *some will harbor their resentment and provoke a quarrel over it even after the lapse of several hours.* Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of the "disposition" of "the ordinary men in the calling"' Jones *v.* Lykes Bros. Steamship Co., supra, 1953 A.M.C. 1012, 204 F. (2d) at 817." (emphasis supplied)

The question of Fall's negligence was properly before the jury. It is correct to conclude that the jury found Fall negligent. The court below had no basis for saying otherwise.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE WRIT OF CERTIORARI HEREBY SOUGHT SHOULD BE GRANTED AND THAT THE JUDGMENT OF THE COURT BELOW BE REVERSED AND THE JUDGMENT IN FAVOR OF THE PETITIONER BE RE-INSTATED.

If this court does not summarily grant this relief and the re-instatement of the jury's verdict then it is respectfully requested that the court order a review of all the issues presented.

Dated: May 18, 1962

Respectfully submitted,

WALTER X. CONNOR
LOUIS KURZ, JR.
Attorneys for Petitioner.

CARROLL JOHN RYAN,
Counsel.

APPENDIX TO PETITION

Opinion of the United States Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18578

EDNA FALL, as Administratrix of the Estate of PHILLIP FALL, Deceased,

Appellant,

versus

ESSO STANDARD OIL COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(December 13, 1961)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This Jones Act litigation turns on the effect of a seaman's possession of a switchblade knife. Jimmie Murphy, a young messman in the crew of the S. S. *Esso Augusta*, stabbed and fatally wounded Phillip Fall, the ship's marine electrician, while the ship was tied to the Esso Refinery's docks in Baton Rouge, Louisiana.

Esso's schedule calls for three months on duty and one month off with pay. Murphy completed his first tour of three months but did not complete his second tour. He left the ship at Mobile and returned to his home in North Carolina, according to the plaintiff, "because had some trouble

with the chief steward"; according to the defendant, because of "incompatibility between the steward and Murphy and nothing more". Several months later the defendant reemployed Murphy and assigned him to the *Esso Augusta*. While his ship was in Mobile, Murphy had purchased a switchblade knife. He bought it, he said, because he had always wanted one and it was "pretty". On the tanker he used to keep the knife on a makeshift table by his bunk; "it was too big to tote around". He had no use for his knife as a messman, he used it to pare his toe nails. His immediate superior, the chief steward, had seen or might have seen the switchblade knife daily during sanitation inspections. On this point the record is unclear; he had seen the knife but was not sure that it was a switchblade knife.

The defendant introduced evidence to show that Murphy came from a religious background, had received part of his education in church academies, and had the reputation of being a polite, quiet, unassuming boy—a description short of accurately describing Murphy's character on the night of April 24, 1957. That night the crew had shore leave. Murphy, without waiting to eat, left ship about seven in the evening. He went to several bars. At Mary's Bar, Mary and he were sitting together, talking, when Fall came in. Fall jerked Murphy around and asked, "What in the Hell are you doing talking to my girl". They got into "a little scrap" which Mary broke up. Later that night Murphy and Fall took the company bus back to the ship. There was more trouble. A sharp turn caused Murphy to fall off the front seat. In seamanlike terms, Fall told Murphy not to "fool around with the driver". They engaged in an exchange of words something less than complimentary. They were still arguing who could whip whom when the bus reached the Esso refinery, a fenced-in enclosure protected by security guards at a gate about a mile and a half from the ship. Murphy and Fall scuffled after leaving the bus, but the driver and two of the guards separated the men and escorted them to the gang plank, apparently to prevent further trouble. The guards testi-

fied that the men looked as if they had been drinking but neither was drunk. We may safely assume, however, that their standards for determining drunkenness in seamen are lower than ordinary police standards.

Murphy, muttering to himself, went through the mess-room to his quarters. It was two-thirty in the morning. Schuler, an assistant engineer, and two of the crew were drinking coffee in the petty officers mess. In a matter of moments, Murphy came back through the mess with the switchblade knife in his hand. Schuler asked, "What are you doing with that knife?" Murphy said that he was "going to get the electrician", and went on through the mess. Schuler followed, but not soon enough. When he reached Fall's quarters he found Murphy and Fall struggling, Murphy with the open knife in his hand. Fall, forty-six years old, weighed about a hundred and forty pounds; Murphy, nineteen years old, weighed about two hundred pounds. Schuler managed to break in between the two. Fall grabbed his chest and ran down the passageway, leaving a trail of blood up the gangway. There he collapsed. He died on the way to the hospital.

The defendant argues that Fall persistently mistreated Murphy. Murphy testified, however, that before the scrap, although he knew Fall by sight as the electrician, he did not even know his name. He said: "The electrician and I have never had any serious arguments or trouble between us prior to last night. He and I weren't too friendly with each other though, because he always considered me like a dog or a lowly messman."

Fall's widow, as administratrix, sued Esso Standard alleging, as her first cause of action, negligence under the Jones Act, 46 USCA §688, and as her second cause of action, unseaworthiness under the general maritime law. The claim under the Jones Act includes an assertion that the death was caused by the defendant's "failure, neglect or omission" to furnish a seaworthy vessel. On the defendant's motion, the district court struck the references in the complaint's first cause of action as to unseaworthiness and dismissed the complaint as to the second cause of

action alleging unseaworthiness. The court also struck the allegations in the complaint which contend that the decedent's claim for pain and suffering caused by unseaworthiness survived in the estate. The court allowed an amendment to the complaint directed to the funeral expenses, but did not rule on the amendment, on the ground that the jury verdict in favor of the defendant precluded him from entering a judgment on the new cause of action.

Each party moved for a directed verdict. The motions were denied. The jury gave a verdict for the defendant on the question of negligence under the Jones Act. The plaintiff appeals from (1) the trial judge's order dismissing the complaint as to unseaworthiness, (2) the final judgment in favor of the defendant, and (3) the ruling on funeral expenses.

The distinguishing characteristic of a switchblade knife is that with the press of a button its blade extends and is securely locked. The knife becomes a stiletto. The handle of Murphy's knife is four and a quarter inches long and shaped like the hilt of a dagger. The blade is heavy steel, three and a half inches long; the last two inches narrow to a point. The point is sharp. Blade out, the knife is an eight-inch stiletto—unsuitable as a screw driver, perhaps usable for paring toe-nails, and highly suitable for stabbing an opponent in a fight.

The complaint and the pre-trial depositions show that the plaintiff's counsel constructed his case on the theory that Murphy's switchblade knife was a dangerous weapon. On that assumption and on evidence showing the defendant's failure to take any action with regard to the knife, counsel contended that the defendant was liable under the Jones Act for negligence and under the general maritime law for failure to furnish a seaworthy vessel. Half of the case collapsed when the trial judge dismissed the complaint as to unseaworthiness. The other half fell apart during the trial when the district judge made it clear that, as a matter of law, he regarded the knife as a useful tool and not a dangerous weapon *per se*. Consistent with this view, the district judge refused to grant any of the

plaintiff's requested charges referring to the knife as a dangerous weapon and gave no instructions with regard to "dangerous weapons" or "switchblade knives". Instead, he instructed the jury:

> "Now, there was some talk here in the beginning of this case about negligence based on the failure to inspect this crewman Murphy's quarters, or pick up his knife, or matters of that sort—confiscate his knife. That issue of negligence is not submitted to you. I have determined as a matter of law that that question should not (537) be submitted to you."

Just before withdrawing this crucial issue from the jury, the district judge stated:

> "In order for the plaintiff to recover damages in this case, it is incumbent upon her to prove by a preponderance of the evidence that the defendant's responsible agents knew, or reasonably should have known, that its employee, Jimmie Murphy, was dangerous to other persons and likely to assault or commit violent acts upon his fellow employees at the time in question."

Just after withdrawing the dangerous weapon issue, the district judge instructed the jury:

> "The issue of fact that I want you gentlemen to decide is whether or not it was negligence under all the circumstances for the Esso Standard Oil Company, through its agents—either through the security guard at the gate who let the men in at the gate of the Refinery, or through the guard who drove the jitney bus down to the turn-around from the gate, or through the man who was called out by the jitney driver to talk to these two men when they got back to the ship there, or through the negligence of the third officer or the third engineer, Shuler, or some other person aboard the ship there—whether under all the circumstances this assault by Murphy on Mr.

> Fall should reasonably have been anticipated. Would a reasonably prudent person under the circumstances have anticipated that there was going to be such an assault and taken proper steps to prevent it."

A useful tool may be a dangerous weapon. Lizzie Borden took an axe. A weapon may be a useful tool. The trial judge cleaned fish with his switchblade knife.[1] But an axe belongs in a tool shed; a seaman cannot bring one aboard ship. A switchblade knife may be appropriate in a fishing box; a messman cannot lawfully bring one aboard ship and, in this case, making bad matters worse, keep it on a table near his bunk, presumably for instant use. Because of the dual nature of certain instruments as tools and weapons, the determination of the character of the instrument for purposes of the litigation is usually one for the jury. If the instrument is a dangerous weapon, the jury must then decide, in the circumstances of such a case as the one at bar, whether the shipowner breached his duty to protect the crew against the consequences of a seaman's possessing a dangerous weapon aboard ship.

Two federal statutes, read together, are dispositive of this case. One of these, the Switchblade Act, was not called to the attention of the district judge, an omission that may account for the tenor of the charges; in a colloquy with the attorneys, the district judge commented on the statutory prohibition of sheath knives and the absence of a statute defining a switchblade as a dangerous weapon.

18 USCA §2277 provides, in part:

> "(a) Whoever brings, carries, or possesses any *dangerous weapon,* instrument, or device, or any

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[1] As appears in a colloquy among counsel and the trial judge, the trial judge, one of the defendant's counsel, and the plaintiff's counsel each has carried a switchblade knife on fishing trips. The argument that a switchblade knife is a handy tool for seamen in case of an accident, such as a seaman's becoming entangled with lines, is similarly applicable to sheath knives. The use of sheath knives aboard vessels by seamen has been prohibited since 1866. Act of July 27, 1866, C. 286 §§ 1, 2, 14 Stat. 304.

> dynamite, nitro-glycerin, or other explosive article or compound on board of any vessel registered, enrolled, or licensed under the laws of the United States, . . . without previously obtaining the permission of the owner or the master of such vessel . . .
>
> ". . . shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The "Shipping Articles", which a master and his crew are required by law to sign,[2] provide: "And it is hereby agreed as follows. . . . No liquor, dangerous weapon or contraband article shall be brought on board. Any such property brought on board by any member of the crew will be confiscated by the master". The "Forecastle Card", required by law to be posted in a place on the ship accessible to the crew,[3] in bold face capital letters provides: "No dangerous weapons or grog allowed, and none to be brought on board by the crew."

In 1958 Congress decided that the use of switchblade knives as cheap, efficient, convenient weapons required prohibitory action at the national level. Pub. L. 85-623, Aug. 12, 1958, 72 Stat. 562, 15 USCA §1241-1244. The Act was adopted some months after Fall's death and some months before the trial of this case. It is, therefore, virtually a contemporaneous, authoritative declaration by Congress itself that switchblade knives are weapons of a particularly dangerous nature. Section 2277 does not define "dangerous weapon" nor qualify it in such a way as to limit its scope to weapons considered dangerous at the time the law was enacted. In these circumstances, it only makes sense to resort to a later statute, even one not directly related to the statute to be construed. See *Farmers' & Merchants' Nat. Bank* v. *Dearing*, 1875, 91 U. S. 29, 23 L. Ed. 196; *Johnson* v. *Southern Pacific Co.*, 1904, 196 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363. Section 1 of the Act, 15 USCA

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[2] 46 USCA §§563-568, 713.

[3] 46 USCA §577.

§1241(b), defines the term "switchblade knife" as "any knife having a blade which opens automatically——

(1) by hand pressure applied to a button or other device in the handle of the knife, or

(2) by operation of inertia, gravity, or both. Pub. L. 85-623, 1, 72 Stat. 562."

Section 2, 15 USCA §1242 prohibits the manufacture for, or transportation or distribution, of switchblade knives.[4] Section 3 prohibits the manufacture, sale, or possession of any switchblade knife within any territory or possession of the United States or within the special maritime or territorial jurisdiction of the United States.[5] Persons violating these sections are subject to a fine of not more than $2,000 or to imprisonment of not more than five years, or both.

In describing the need for the legislation, the Senate Report, on the bill by the Committee on Interstate and Foreign Commerce,[6] explains that twelve states have

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[4] 15 USCA §1242 provides: "Whoever knowingly introduced, or manufactures for introduction, into interstate commerce, or transports or distributes in interstate commerce, any switchblade knife, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

[5] 15 USCA §1243 provides: "Whoever, within any Territory or possession of the United States, within Indian country (as defined in section 1151 of Title 18), or within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of Title 18), manufactures, sells, or possesses any switchblade knife, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

[6] Senate Report No. 1980, July 28, 1958, to accompany H. R. 12850, 85th Cong., 2d Sess. 2 U. S. Code and Administrative News, 85th Cong., 2d Sess., 1958, p. 3435. The report quotes the following language from a special study of juvenile delinquency made by a Subcommittee of the Committee on the Judiciary of the Senate (Sen. Rept. No. 1429, 85th Cong., 2d Sess.):

"The subcommittee's investigation disclosed that many of these knives were manufactured abroad and distributed by firms in this country who handle numerous items in addition to switchblade knives.

"It was established that these items were being widely distributed through the mail by distributors to the various

already enacted legislation prohibiting the manufacture, sale, or possession of switchblade knives. The measure, however, "goes beyond merely helping states in local law enforcement":

> "The switchblade knife is, by design and use, almost exclusively the weapon of the thug and the delinquent. Such knives are not particularly adapted to the requirements of the hunter or fisherman, and sportsmen generally do not employ them. It was testified that, practically speaking, there is no legitimate use for the switchblade to which a conventional sheath or

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States that had local laws prohibiting possession, sale, or distribution of switchblade knives. This fact, the subcommittee feels, points out the need for Federal control of the interstate shipment of these instruments, since local legislation is being systematically circumvented through the mail-order device.

"In the United States 2 manufacturers have a combined production of over 1 million switchblade knives a year. Both concerns are important cutlery manufacturers and the manufacture of switchblade knives represents only a small part of their business. It is estimated that the total traffic in this country in switchblade knives exceeds 1,200,000 per year.

"The questionnaires returned by police chiefs throughout the country indicate that many switchblade knives have been confiscated from juveniles. The police chiefs, almost without exception, indicate that these vicious weapons are on many occasions the instrument used by juveniles in the commission of robberies and assaults. Of the robberies committed in 1956, 43.2 percent were by persons under 21 years of age. A switchblade knife is frequently part of the perpetrator's equipment in this type of crime. In New York City alone in 1956, there was an increase of 92.1 percent of those under 16 arrested for the possession of dangerous weapons, one of the most common of which is the switchblade knife."

The report points out that:

> "As a result of this study, a bill (S. 2558) to prohibit the manufacture for, or distribution in, interstate commerce of switchblade knives was introduced by Senator Kefauver and referred to your committee. The present measure, which was passed by the House of Representatives on June 27, 1958, is similar to the Senate bill but, unlike the latter, is not aimed specifically at sales to juveniles."

jackknife is not better suited. This being the case, your committee believes that it is in the national interest that these articles be banned from interstate commerce."

It is now settled beyond doubt that a switchblade knife is a dangerous weapon, and if Murphy's possession of his knife had occurred after the effective date of the Switchblade Act we should feel compelled to hold, as a matter of law, that possession of such a knife was a violation of Section 2277. But the stabbing took place before the Act was adopted. Accordingly, we do not say, *as a matter of law,* that the knife was a dangerous weapon. We say, as the Act indicates, that a fair and reasonable interpretation of the term "dangerous weapon" permits a jury to find that Murphy's knife came within the statutory meaning.

Apparently without benefit of the Switchblade Act, the chief mate nevertheless had a firm understanding of the appropriate action that should be taken with regard to a seaman's possessing a switchblade knife on board ship. In his pre-trial deposition he said:

"Q. Would you consider a switchblade knife a dangerous weapon? A. Yes, I would.

"Q. If you had known that it was aboard the vessel, what would you have done? A. Well, if I had known it was aboard the vessel, I would have notified the Captain and he either would have gone back with me, or sent me back, to take it away from him. They are not allowed on ships; a sheave (sic) knife or a switchblade knife." (Nelson's Deposition, P. 34-36, See Appendix.)

"Q. That's part of the foc'sle card, that you are not allowed to have dangerous weapons aboard? A. That's right. But that's the first I knew or heard about a switchblade knife. But they have knives on the ship; they have little pocket knives, but I know that switchblade knives and sheave knives, they don't allow."

. . . . . .

"Q. Are they informed at that time that they are not supposed to carry dangerous weapons, or take dangerous weapons board? A. Well, I don't know if anybody was informed; everybody knows that. You never see those type knives on a ship; I never have. . . ."

At the trial the plaintiff's counsel saw the chief mate in the courtroom and called him as a witness. The mate testified:

"Q. Are switchblade knives allowed aboard vessels?

"The Court: By whom?

"By Mr. Roth:

"Q. Switchblade knives in the possession of crewmen, are they allowed aboard vessels? A. Yes, I think they are."

Taken by surprise, counsel proffered the deposition to impeach the witness. The court did not permit the use of the deposition. The court held that the chief mate was the plaintiff's witness and that the testimony indicated a slight variance, but no hostility. We consider that the chief mate, who is in charge of the ship in the absence of the master, and was in fact in charge at the time of the fight, is in a managerial capacity and is so identified with the interests of the shipowner, as against the interests of a seaman, that he should be treated as a managing agent under F. R. Civ. P. 43 (b). See *June T, Inc.* v. *King*, 1961, 5 Cir., 290 F. 2d 404, 406. The plaintiff should not be bound by the chief mate's testimony and the mate should be subject to cross examination. Here, his testimony—assuming that he was right the first time when he gave his deposition in the office of the defendant's counsel—shows that the practice in the merchant marine *is* to consider switchblade knives as dangerous weapons and not allow them aboard ship. His deposition underscores the obvious fact that a switchblade knife is regarded as lethal aboard ship as it is in the back alleys of gang-infested urban areas.

Summarizing, we hold that the district court erred in not submitting to the jury the question whether a switchblade

knife is a dangerous weapon within the meaning of 18 USCA §2277. It is also for the jury to decide, under appropriate instructions, if the shipowner, through his officers, agents, or employees, knew or should have known that Murphy had a switchblade knife on the *Esso Augusta* and whether the shipowner failed to take prudent action to protect the crew. In view of our holding we are of the opinion, without belaboring the point, that the record does not support a finding that the victim was negligent, and that the question of Fall's negligence should not have been submitted to the jury. Fall could not have foreseen the vicious attack Murphy made upon him with a dangerous weapon. We feel compelled to hold that the general maritime law, unaided by the Jones Act, anomalously, archaically, unnecessarily in terms of general principles, gives Fall's widow and administratrix no right of action. We observe that if, on retrial, the evidence permits a finding of a negligent failure to comply with the absolute duty to furnish a seaworthy vessel, the Jones Act provisions apply to an injury resulting from such unseaworthiness. *Cortes* v. *Baltimore Insular Line*, 1932, 287 S. Ct. 367, 53 S. Ct. 173, 77 L. Ed. 368; *Michalic* v. *Cleveland Tankers*, 1960, 364 U. S. 325, 81 S. Ct. · , 5 L. Ed. 2d 20; *Vickers* d/b/a *Delta Towing Company* v. *Floyd Tumey*, 5 Cir., 1961, 290 F. 2d 426. There is no reason why the survival provisions of the Act should not apply to a death resulting from such injury. We find it unnecessary at this time to determine other issues, including the question whether the Jones Act permits a death action based on non-negligent unseaworthiness.[7] We leave this issue open without prejudice to the plaintiff.

The judgment is Reversed and the case Remanded for proceedings consistent with this opinion.

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[7] See Lindgren v. United States, 1930, 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686; Holland v. Steag, Inc., D. C. Mass., 1956, 143 F. Supp. 311, Bath v. Sargent Line Corp., S. D. N. Y., 1958, 311. Cf. Comment on Lindgren in Kernan v. American Dredging Co., 1958, 355 U. S. 420, 78 S. Ct. 394, 2 L. Ed. 2d 382; M. V. Tungus v. Skorgaard, 1959, 358 U. S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524; Gill v. United States, 2 Cir., 1950, 184 F. 2d 49, 51. See also,

United States Constitution.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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the concurring opinion of Judge Lumbard in Bartholomew *v.* Universe Tankships, Inc., 2 Cir., 1959, 263 F. 2d 437, 448; Turcich *v.* Liberty Corp., 3 Cir., 1954, 217 F. 2d 495.

The continuous expansion of basic principles in the rapidly developing field of maritime injuries suggests the desirability of the trial court giving consideration to the submission of the case to the jury by special interrogatories under F. R. Civ. p. 49. Such interrogatories might well encompass the issues of negligence, negligent unseaworthiness, and non-negligent unseaworthiness. In this way the trial court, and later, if necessary, this court on review, will have precise fact findings on which to apply the then applicable law. See, e.g., Vickers *v.* Tumey, 5 Cir., 1961, 290 F. 2d 426, 1961 AMC 1173, notes 4 and 9; Warren Petroleum Company *v.* Thomasson, 5 Cir., 1959, 268 F. 2d 5, 9, note 3; Clegg *v.* Hardware Mutual Casualty Co., 5 Cir., 1959, 264 F. 2d 152; Busy Electric *v.* Travelers Ins. Co., 5 Cir., 1961, 294 F. 2d 139, 142.

The Jones Act, 46 U. S. C. 688.

Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Wearing of Sheath Knives, 46 U. S. C. 710.

"No seaman in the merchant service shall wear any sheath knife on shipboard. It shall be the duty of the master of any vessel registered, enrolled or licensed under the laws of the United States, and of the person entering into contract for the employment of a seaman upon any such vessel, to inform every person offering to ship himself of the provisions of this section, and to require his compliance therewith, under a penalty of $50 for each omission, to be sued for and recovered in the name of the United States under the direction of the Commandant of the Coast Guard; one half for the benefit of the informer, and the other half for the benefit of the fund for the relief of sick and disabled seamen."

Explosives or dangerous weapons aboard vessels. 18 U. S. C. 2277.

(a) Whoever brings, carries, or possesses any dangerous weapon, instrument, or device, or any dynamite, nitroglycerin, or other explosive article or compound on board of any vessel registered, enrolled, or licensed under the laws of the United States, or any vessel purchased, requisitioned, chartered, or taken over by the United States pursuant to the provisions of Act June 6, 1941, ch. 174, 55 Stat. 242, as amended, without previously obtaining the permission of the owner or the master of such vessel; or

Whoever brings, carries, or possesses any such weapon or explosive on board of any vessel in the possession and under the control of the United States or which has been seized and forfeited by the United States or upon which a guard has been placed by the United States pursuant to the provisions of section 191 of Title 50, without previously obtaining the permission of the captain of the port in which such vessel is located, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) This section shall not apply to personnel of the Armed Forces of the United States or to officers or employees of the United States or of a State or of a political subdivision thereof, while acting in the performance of their duties, who are authorized by law or by rules or regulations to own or possess any such weapon or explosive. June 25, 1948 c. 645, 62 Stat. 804.

Switchblade Act, 15 U. S. C. §1241.

Definitions

As used in this chapter—

(a) The term "interstate commerce" means commerce between the State, Territory, possession of the United States, or the District of Columbia, and any place outside thereof.

(b) The term "switchblade knife" means any knife having a blade which opens automatically

(1) by hand pressure applied to a button or other device in the handle of the knife, or

(2) by operation of inertia, gravity, or both. Pub. L. 85-623 §1, Aug. 12, 1958, 72 Stat. 562.

Introduction, manufacture for introduction, transportation or distribution in interstate commerce; penalty. §1242

Whoever knowingly introduces, or manufactures for introduction, into interstate commerce, or transports or distributes in interstate commerce any switchblade knife, shall be fined not more than $2,000 or imprisoned not more than five years or both. Pub. L. 85-623, §2, Aug. 12, 1958, 72 Stat. 562.

Manufacture, sale, or possession within specific jurisdictions, penalty. §1243

Whoever, within any Territory or possession of the United States, within Indian country (as defined in section 1151 of Title 18) or within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of Title 18), manufactures, sells or possesses any switchblade knife, shall be fined not more than $2,000 or imprisoned not more than five years or both. Pub. L. 85-623 §3, Aug. 12, 1958, 72 Stat. 562."

Exceptions, §1244.

Sections 1242 and 1243 of this title shall not apply to

(1) any common carrier or contract carrier, with respect to any switchblade knife shipped, transported, or delivered for shipment to interstate commerce in the ordinary course of business;

(2) the manufacture, sale, transportation, distribution, possession or introduction into interstate commerce, of switchblade knives pursuant to contract with the Armed Forces;

(3) the Armed Forces or any member or employee thereof acting in the performance of his duty; or

(4) the possession, and transportation upon his person, of any switchblade knife with a blade three inches or less in length by any individual who has only one arm. Pub. L. 85-623, §4, Aug. 12, 1958, 72 Stat. 562.

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IN THE

Supreme Court of the United States

October Term, 1961

No. ~~900~~ 135

ESSO STANDARD OIL COMPANY, a corporation,

Petitioner,

vs.

EDNA FALL, as Administratrix of the Estate of PHILLIP FALL, deceased,

Respondent.

Petition For Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

William M. Alper
448 Pan American Bank Building
Miami 32, Florida

Arthur Roth
1111 Ainsley Building
Miami 32, Florida

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IN THE

Supreme Court of the United States

October Term, 1961

No. 990

ESSO STANDARD OIL COMPANY, a corporation,

Petitioner,

vs.

EDNA FALL, as Administratrix of the Estate of PHILLIP FALL, deceased,

Respondent.

Petition For Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The opinion of the Court of Appeals for the Fifth Circuit is reported at 297 F.2d 411, and is copied in full in Appendix A of the petition.

JURISDICTION

Jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. Where a Court of Appeals grants a new trial for errors in submission of issues to the jury is there a violation of the Seventh Amendment of the Constitution?

2. Where the Court of Appeals did not decide the issues controlling an alleged conflicting opinion should the petition for certiorari be denied?

3. Where the Court of Appeals referred to the Switchblade Act to support its holding that it was a jury question whether the switchblade knife was a dangerous weapon, is this an ex post facto application of a criminal statute or a violation of the Fifth Amendment of the Constitution?

4. Did the Court of Appeals err in holding that contributory negligence should not have been submitted to the jury?

5. Where the petitioner fails to include as a question presented one of the reasons stated by the Court of Appeals for granting a new trial is this not persuasive in denying the petition for certiorari?

STATEMENT

Respondent's decedent, Phillip Fall, was stabbed and killed by Jimmy Murphy on petitioner's S.S. "Esso Augusta" at the Esso Standard Refinery docks, Baton Rouge, Louisiana. Both were crew members of this vessel, Fall as an electrician and Murphy as a crew messman. Mur-

phy's fatal weapon was a common switchblade knife which he kept in open view on a box adjacent to his bunk.

On the evening of the fatality Murphy and Fall quarreled and scuffled in a local bar. Later they again argued while proceeding in an Esso jitney from the refinery entrance to the dock area. At the dock area an attempted assault by Murphy was prevented by Esso guards, Murphy was admonished and escorted to the gangway.

Shortly thereafter Murphy proceeded hurriedly from his quarters through the mess room to Fall's room. He was seen by Third Assistant Engineer Schuler, who not only observed that Murphy was drunk, but saw the switchblade knife in Murphy's hand and heard him mutter something about getting the electrician. About a half minute later he followed Murphy and found him with the open switchblade knife in his hand struggling with Fall. Schuler finally stopped the assault and forced Murphy to drop the knife. Fall staggered from his quarters to the dock where he collapsed, was removed by ambulance and died thereafter as a result of the stabbing.

Respondent sued petitioner alleging negligence under the Jones Act, 46 U.S.C. Section 688, and unseaworthiness under the general maritime law. The case was submitted to the jury solely on the negligence count on issues severely limited by the trial judge resulting in a jury verdict for the shipowner. Final Judgment for petitioner was reversed on questions of law by the Court of Appeals for the Fifth Circuit at 297 F.2d 411.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Respondent respectfully submits that this petition should be denied for the following reasons:

I.

REMAND FOR NEW TRIAL BY THE COURT OF APPEALS DOES NOT VIOLATE THE SEVENTH AMENDMENT OF THE CONSTITUTION.

On appeal from a jury verdict and judgment in favor of petitioner the Court of Appeals reversed and remanded for new trial. It held the trial court erred in refusing to submit to the jury under appropriate charges the following issues: (1) whether the switchblade knife was a dangerous weapon under 18 U.S.C.A. Section 2277; (2) whether the shipowner knew or should have known that Murphy had the switchblade knife on the vessel and confiscated it; and (3) whether the shipowner negligently failed to comply with its absolute duty to furnish the seaworthy vessel. It also held that the trial court erred in submitting contributory negligence to the jury and in improperly restricting respondent's impeachment and examination of the Chief Mate. Where, as here, the Court of Appeals reverses a jury verdict for errors in submission of issues to the jury under appropriate charges, i.e., on questions of law, and remands the case for new trial this does not violate and, on the contrary, is in accord with the Seventh Amendment. **Gasoline Products Company v. Champlin Refining Company**, 283 U.S. 494; **Slocum v. New York Life Insurance Company**, 228 U.S. 364; **Capital Traction**

Company v. Hof, 174 U.S. 1; C.A. **Treat Manufacturing Company v. The Standard Steel & Iron Company**, 157 U.S. 674; **Mutual Benefit Health & Accident Ass'n v. Bowman**, 8th Cir., 99 F.2d 856. Petitioner errs in arguing that this reversal and direction of a new trial is an unconstitutional infringement of the jury's findings of fact. Not only has there been no interference or re-examination of fact findings of the jury, but the jury was not even permitted to consider these issues. Actually the Court did not permit the jury to decide whether the switchblade knife was a dangerous weapon nor did it permit the jury to consider the negligence this created (N.T. 445-457, 471, 474, 501-505) and so charged the jury (N.T. 518).[1] Appropriate exceptions were taken to the Court's refusal to charge on these issues (N.T. 457). There is no constitutional issue in this case.

II.

THERE IS NO CONFLICT WITH CONNOLLY v. FARRELL LINES INC., 1ST CIR., 268 F. 2D 653.

In Connolly v. Farrell Lines Inc., supra, the court sustained a directed verdict holding: (1) that the seaman failed to prove negligence of the shipowner in employing a dangerous seaman; and (2) that the assault and the weapon were insufficient to sustain a finding of a substandard seaman, i.e., unseaworthiness. Neither of these issues in Connolly were decided by the Fifth Circuit. Respondent did not contend that the shipowner was negligent in hiring or continuing the employment of a known dangerous seaman and the reversal by the Court of Appeals

[1] "N.T." refers to reporter's notes of testimony

was not predicated in any way on this theory of negligence. The second point of the Connolly opinion, unseaworthiness, was likewise not reached in the opinion below, but the court merely refused to decide at this time whether the respondent could enforce a death claim for unseaworthiness. Not only is there no conflict with **Connolly** v. **Farrell Lines Inc.**, supra., but the Connolly decision itself is in conflict with **Boudoin** v. **Lykes Bros. Steamship Company Inc.**, 348 U.S. 336; **Jones** v. **Lykes Bros. S. S. Co.**, 2d Cir., 205 F. 2d 815; **Keen** v. **Overseas Tankship Corp.**, 2d Cir., 194 F.2d 515.

Respondent's complaint about the appellate court's suggestion that the trial judge submit interrogatories to the jury on negligence, negligent unseaworthiness, and non-negligent unseaworthiness does not warrant review by this Court. This suggestion merely recognizes that the courts have neither reached nor discussed this issue since **Lindgren v. United States**, 281 U.S. 38, and it is currently the subject of vigorous and heated litigation. **Kernan, Admr. v. American Dredging Co.**, 355 U.S. 426; **Turcich, Admx. v. The Liberty Corporation**, 3rd Cir., 217 F.2d 495; **Gill** v. **United States**, 2nd Cir., 184 F.2d 49, 57 (dissent).

III.

REFERENCE TO THE SWITCHBLADE ACT, 15 U.S.C. SECTION 1241 WAS NOT ERROR.

Since the Switchblade Act was enacted after Fall's death the court could not and did not construe this Act together with the Dangerous Weapon Act (18 U.S.C. Section 2277) to hold that Murphy's switchblade knife was a dangerous weapon as a matter of law. The Switchblade

Act simply demonstrated that the Congress of the United States considered a switchblade knife to be a dangerous weapon, that a jury had the right to agree with the Congress and that the trial court erred in prohibiting the jury from so doing. In this context reliance on the Switchblade Act was not an **ex post facto** application of a criminal statute or a violation of the Fifth Amendment of the Constitution.

IV:

THERE WAS NO ISSUE OF CONTRIBUTORY NEGLIGENCE TO SUBMIT TO THE JURY.

Although Fall and Murphy quarreled twice earlier in the evening, they were separated at the vessel and went to their respective quarters. Thereafter Murphy took his switchblade knife, proceeded through the mess room to Fall's room and stabbed him. No one witnessed the onset of the fatal assault and the stabbing except Fall and Murphy. Murphy testified by deposition that he did not remember what occurred when he arrived at Fall's quarters. There was no competent evidence to establish that Fall was either the aggressor or was otherwise guilty of negligence after the men boarded the vessel. Petitioner repeatedly refers to Murphy's written statement given to the local police to argue that Fall was the aggressor at the time of the fatal assault. However, this statement was admitted solely to impeach Murphy's amnesia with the proviso that it did not and could not prove the facts set forth therein (N.T. 281). Thus, petitioner failed to sustain its burden on contributory negligence and the court below correctly held there was no jury issue. Petitioner errs in stating that respondent did not object to petitioner's request for a charge on contributory negligence (N.T. 486).

V.

PETITIONER'S FAILURE TO CERTIFY AS A QUESTION PRESENTED ONE OF THE REASONS FOR GRANTING A NEW TRIAL SHOULD BE PERSUASIVE IN DETERMINATION OF THIS PETITION.

One of the grounds for granting a new trial was the trial court's error in prohibiting impeachment of the Chief Mate and use of his pre-trial deposition. Petitioner has not assigned this ruling as a question presented. Under these circumstances this Court should remand this case to the District Court for a new trial since this Court has held repeatedly it will not consider errors not assigned by the petitioner. **Mazer v. Stein**, 347 U.S. 201; **United States v. Crescent Amusement Co.**, 323 U.S. 173; Supreme Court Rule 40(1)(d)(2).

CONCLUSION

Respondent respectfully submits that this Petition for Writ of Certiorari should be denied for the reasons set forth above.

William M. Alper
448 Pan American Bank Building
Miami 32, Florida

Arthur Roth
1011 Ainsley Building
Miami 32, Florida

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 33(1) copies of the foregoing brief were served upon Walter X. Connor, 120 Broadway, New York, N. Y., and Louis Kurz, Jr., 704 Florida Theatre Building, Jacksonville, Florida, attorneys for petitioner, by depositing same in the United States Post Office with first class air mail postage prepaid thereon on this _____ day of June, 1962.

William M. Alper

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No. 135

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1962~~ 1969.

GEORGE R. DEMPSTER and FRANCES S. DEMPSTER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION TO REHEAR

and

PETITION TO REHEAR.

CHARLES D. SNEPP,
Fidelity Bankers Trust Building,
Knoxville, Tennessee,
Counsel for Petitioners.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

GEORGE R. DEMPSTER and FRANCES S. DEMPSTER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION TO REHEAR.

The petitioners move for leave to file the accompanying petition requesting the Court to rehear or reconsider its order of October 12, 1959, in Docket No. 135 (361 U. S. 819) denying their timely filed petition for certiorari to the United States Court of Appeals for the Sixth Circuit, per curiam decision (265 F. (2d) 666), which reversed a decision in their favor by the United States District Court for the Eastern District of Tennessee (162 F. Supp. 585).

In support of this motion, the petitioners would show that on January 14, 1963, this Court, in Docket No. 632, granted the Government's petition for certiorari to the

United States Court of Claims for the purpose of reviewing its decision in **Aaron Zacks v. United States**, 280 F. (2d) 829, wherein said Court expressly refused to follow or adopt the holding of the Sixth Circuit in petitioners' case and ruled contrary thereto. The Court of Claims rendered its decision on July 15, 1960, but due to subsequent proceedings its final judgment was not entered until July 6, 1962, and the Government's petition for certiorari was not filed until December 3, 1962.

The issue in petitioners' suit was, and is, the same, in all respects, with that presented in **Zacks**, and in the Government's petition for certiorari this conflict in decisions was assigned as the reason why the writ should be granted, it being stated by the Government (pages 6-7, 18) that:

> "The decision of the Court of Claims in this case is in conflict with the decisions of the Fifth Circuit in **Tobin v. United States**, 264 F. 2d 845, and the Sixth Circuit, per curiam, in **United States v. Dempster**, 265 F. 2d 666, certiorari denied, 361 U. S. 819. All of these cases involved the same issue, i. e., whether refund claims grounded on Section 117 (q) and filed after the running of the statute of limitations were timely. **Tobin** and **Dempster** held that the enactment of Section 117 (q) did not by implication extend the ordinary limitations period; **Zacks** held that it did. . . ."
>
> * * * * * * *
>
> "There is a direct conflict of decisions which requires resolution by this Court. The issue is one concerning basic principles and of great importance in the administration of the tax law. The petition for certiorari should accordingly be granted."

The petitioners concur in the Government's statements aforesaid, and inasmuch as certiorari has been granted in

Zacks, a situation exists which fully warrants and justifies a review of petitioners' suit (**Zap v. United States**, 300 U. S. 800; **Land v. Dollar**, 340 U. S. 884, 948; 341 U. S. 737), and the expiration of the "1959 Term" in no way affects the power of the Court to now grant the same (**Title 28, U. S. C., Sec. 452**).

Moreover, in the interest of fairness and justice, petitioners should be accorded the same right to a review as has been granted the Government in **Zacks**, and they should not be denied this right by any lapse or expiration of time, especially when due to circumstances not of their own making and over which they could exercise no control. Neither the time limitation of Rule 58 (2), Supreme Court Rules, nor any similar rule, prohibits the filing of the petition to rehear. This Court has "consistently ruled that the interest in finality of litigation must yield when the interests of justice would make unfair the strict application" of its rules (**U. S. v. Ohio Power Co.**, 353 U. S. 98, and other cases there cited).

Wherefore, petitioners pray that they be granted permission to file, out of time, the accompanying petition to rehear.

Respectfully submitted.

CHARLES D. SNEPP,
Counsel for Petitioners.

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

GEORGE R. DEMPSTER and FRANCES S. DEMPSTER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION TO REHEAR ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioners earnestly and respectfully request the Court for a rehearing and reconsideration of their petition for a writ of certiorari because:

As is shown by the accompanying motion for leave to file this petition, there is presently pending in this Court the case of **United States v. Zacks**, Docket No. 632, which presents for decision the same identical issue as that presented in petitioners' suit, wherein a timely filed petition for certiorari was denied on October 12, 1959, 361 U. S. 819. The Court of Claims in the **Zacks** case decided the

issue contrary to the holding of the Sixth Circuit Court of Appeals in petitioners' suit, and in so doing expressly refused to follow the decision of the Sixth Circuit.

A rehearing may be granted when the same issue is before the Court in a pending case **(Pickett v. Union Terminal Co.**, 313 U. S. 591; 314 U. S. 704; 315 U. S. 386, 394). The Court has and may even reverse itself *sua sponte* subsequent to the denial of certiorari when a review has been granted in another case involving the same issue **(Bowden v. Smith**, 316 U. S. 584, 589), and if that other case is in direct conflict with the one in which a review was previously denied, which is the situation here presented, it is proper to vacate the former denial and grant certiorari **(Helvering v. Sprouse**, 313 U. S. 810, 831; 316 U. S. 656; 318 U. S. 604).

For the foregoing reasons, petitioners pray that this petition to rehear be granted and that the Court vacate its previous order denying their petition for certiorari and now grant the same.

Respectfully submitted,

CHARLES D. SNEPP,
Counsel for Petitioners.

Certificate.

I, Charles D. Snepp, counsel for petitioners herein, do hereby certify that the foregoing petition is presented and filed in good faith and not for the purposes of any delay and I do further certify that the petition is restricted to the grounds specified therein.

Charles D. Snepp.